UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

v. 22 CR 673 (LAK)

SAMUEL BANKMAN-FRIED

Defendant

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New York, N.Y.
August 30, 2023
1:00 p.m.

Before:

HON. LEWIS A. KAPLAN
District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorneys for the
Southern District of New York
NATHAN REHN
DANIELLE KUDLA
DANIELLE SASSOON
SAMUEL RAYMOND
NICOLAS ROOS
Assistant United States Attorney

COHEN & GRESSER LLP
Attorneys for Defendant
CHRISTIAN R. EVERDELL
MARK COHEN

(The Court and all parties appearing via Teams)

THE COURT: Good afternoon everybody. Let me first make sure we have the reporter on the line.

(Replies)

THE COURT: Perfect.

United States v. Samuel Bankman-Fried.

Counsel for the government, put in your appearances, please.

MR. REHN: Good afternoon, your Honor.

This is Thane Rehn for the United States. We also have on the line Nick Roos, Danielle Sassoon, Danielle Kudla and Samuel Raymond.

THE COURT: Good afternoon, folks.

For the defendant.

MR. COHEN: Yes. Good afternoon, your Honor.

Mark Cohen, Cohen & Gresser, for the defendant.

MR. EVERDELL: Christian Everdell, Cohen & Gresser, for the defendant.

THE COURT: Good afternoon. The sequencing which I would like to deal with the matters we have before us this afternoon are, first of all, the in limine motion, and I propose to talk about the MDC situation, and we will deal with the advice of counsel problem last.

Anybody have a different suggestion? Okay.

MR. REHN: That's fine, your Honor.

THE COURT: Who is going to address it for the defendant?

MR. COHEN: I will, your Honor.

THE COURT: Happy to hear you.

MR. EVERDELL: Thank you, your Honor.

Your Honor, as we set forth in our motion in limine, the government has consistently missed deadlines that it represented to the Court that it would make, and they have been producing voluminous discovery to us just in the last several weeks and even in the last few days.

Your Honor, the last status report the Court gave to the -- that the government gave the Court on discovery was at the June 15 hearing, and they said that they still needed to produce data from Google accounts and slack data from Gary Wang's laptop. Of course there was still the voluminous ongoing subpoena returns that kept coming in, and I believe are continuing to come in.

THE COURT: Excuse me. They go to you, that material or some subset of it goes to you because you asked for it under Rule 16, right?

MR. EVERDELL: Your Honor, yes, it is the burden of the government to produce what they plan to use and what they plan to rely upon at trial under Rule 16.

THE COURT: Through Rule 16.

MR. EVERDELL: Yes, it's Rule 16, your Honor.

THE COURT: And if I remember correctly, that's reciprocal. They don't have that obligation unless you ask for it and agree to make some disclosure. Is that right?

MR. EVERDELL: I believe that's correct, your Honor.

THE COURT: So what you're complaining about there is that the government has been recently producing to you materials that you asked, for which in some degree or another is only now in the government's possession and control as opposed to having been there all along, right?

MR. EVERDELL: Well, your Honor, I think we need to take a bit of a step back, because I think that we have to frame the context for why we are here. The reason why these materials are only coming to the government right now and then in turn only coming to us is because of the speed at which the government chose to charge this case. They chose this schedule that we are on. A lot of these materials --

THE COURT: Well, now, that's not exactly -- sir, that isn't exactly right either. They indicted the case when they had probable cause to go to the grand jury, and you both came in at the very first conference and asked for October 5, right?

MR. EVERDELL: Yes, your Honor. And, your Honor, this is where the tension lies because the defendant does have a right to pick a date for a speedy trial. We chose a date that we thought would be -- you know, it was certainly an aggressive date because our client wants to clear his name, and we didn't

choose one that was far out for that reason, but it shouldn't be the case that if the client and if the defendant wants to make that choice that then we have to sort of suffer the consequences of late produced discovery coming to us in order to keep that trial date.

THE COURT: You are not complaining about, as I understand it, the late produced discovery in the sense that the government had it and withheld it. You're complaining that the government got it and turned it over to you, and when the government got it and therefore turned it over to you, that was late given the starting date that you all agreed on. Yes?

MR. EVERDELL: Yes, your Honor, I -- yes. That is correct. The fact is because of the way the case was charged, because the government charged it before they had even requested a lot of these documents and requested this evidence, this evidence is now coming to us far late in the game up to the point where it's now four weeks till trial, and we're still getting productions of millions of pages, and we should not what bear the consequences of that decision for the government to have charged the way that they did, and we are left in a position where we're bearing the consequences not being able to actually do a substantive review of these documents in time for trial.

THE COURT: Well, now most of the documents have been produced in searchable form and with indices, have they not?

MR. EVERDELL: Your Honor, this also butts up against what our client's current situation is because he needs to be able to review these documents as well. And right now he's in jail, and he doesn't have the ability to look at this stuff and search it in the way he used to before he was out. So we are faced with a problem of getting documents produced millions of pages within four weeks to go to trial, and our own client has no real means to review them, and that -- and we can't be in that position. He has the right to look at discovery that's being produced to him being used in the trial against him. And with the documents we're getting right now, he can't do that.

THE COURT: Anything else?

MR. EVERDELL: Your Honor, I think it's just that given how late these were produced, and we have raised this issue -- one moment, your Honor. I would ask, for example, is the government planning to make any additional productions at this point? Because, I mean, we've still gotten a number in very recently, but there may be more coming. It seems like the subpoena returns, for example, keep coming in, and they're just going to keep producing them.

THE COURT: Well, do you object to their producing them? Are you saying now that any other Rule 16 material that comes into the government's control post today, they have no obligation to produce?

MR. EVERDELL: Your Honor, what I think I'm saying is

that we -- they can't be used at this point at trial because if we know they're going to be used, then we need to be able to review them, and we can't review them this late in the game. This is far too late in the game for us to be able to prepare and review those documents in time to prepare the defense if they're going to be used at trial.

THE COURT: But you haven't asked for more time.

MR. EVERDELL: No, we haven't, your Honor.

THE COURT: Well, would you like to?

MR. EVERDELL: Your Honor, I don't think we want to ask for more time currently at the moment. No.

THE COURT: Okay. Anything else you want to say on the subject?

MR. EVERDELL: No, your Honor.

THE COURT: I had one question for you. At some point along the way there was a lot of expressed desire on the part of the defendant to get the FTX code base. Has that been turned over?

MR. EVERDELL: Your Honor, we asked for both a code base and the code base history, which is the edit history to the code base. The code base itself was supplied directly, I believe, by the FTX debtors, but that has to be looked at online. And so, again, it butts up against the circumstances that we face where the defendant really can't access that without looking at it online.

THE COURT: And you have seven expert witnesses, at least some of whom are capable of understanding the code base, yes?

MR. EVERDELL: Sorry, your Honor. Say again?

THE COURT: You have seven expert witnesses you're proposing, at least some of whom, or one of whom is capable of looking at the code base and understanding it, yes?

MR. EVERDELL: Well, your Honor, it's not a substitute for the defendant's own review of the code base.

THE COURT: You haven't answered the question.

MR. EVERDELL: Your Honor, we have people who this -- this code base is a bespoke code base, right?

THE COURT: I'm sorry, it's a what?

MR. EVERDELL: It's a bespoke code base. The people who truly understand it best are the ones who designed it, which are the government's own witnesses. We are working as best we can with our own experts to understand it and the defendant, his input on it is critical.

THE COURT: And when was that made available to you?

MR. EVERDELL: Your Honor, I don't think I have the date in front of me right now. I can get it for you, your Honor.

THE COURT: Okay. And is this something that's included in any of the various totals of pages that are in your letters?

MR. EVERDELL: No, your Honor.

THE COURT: Now, you asked for the edit history, you said. Did you get that.

MR. EVERDELL: No, we have not received the code base history.

THE COURT: Does the government have it, as far as you know?

MR. EVERDELL: As far as I know, they have put us directly in touch with the debtors because they say this information has to come directly from the FTX debtors, and that's how we got the -- and so I don't know if they have it or they don't. I don't think they do.

THE COURT: Did you ask them for it?

MR. EVERDELL: Yes, we've been asking them for it, and they have put us in touch with the FTX debtors and said this has to be produced directly --

THE COURT: Did you ask the FTX debtors for it?

MR. EVERDELL: Your Honor, we asked the government to facilitate this for us because they offered to do this on our behalf, hearing this would be actually the quickest way to get it from the FTX debtors.

THE COURT: Did you ask the FTX debtors for access to it?

MR. EVERDELL: I have to check to see if I have emails between the FTX debtors on this. I believe I had a

conversation with them about this, and then I asked the government to facilitate.

THE COURT: And whom did you ask specifically?

MR. EVERDELL: Your Honor, I have to go back and check my notes.

THE COURT: Anything further from the defense on this?

MR. EVERDELL: No, your Honor.

THE COURT: Who's going to address it for the government, please?

MR. REHN: I will be addressing it, your Honor.

THE COURT: Okay.

MR. REHN: Your Honor, as set forth in the government's letter and response to defendant's motion in limine, there has been no violation of Rule 16 in this case by the government.

THE COURT: I don't think that they claim that there is.

MR. REHN: We agree, your Honor, but that makes all the more pertinent the fact that the remedy they're seeking is preclusion of evidence from trial is completely inappropriate because courts have found that even in instances in which there were a Rule 16 violation, the preferred remedy would not be preclusion. That's an extreme and unusual remedy that's been applied very rarely in a small number of cases which are distinguishable for the reasons set forth in our letter.

With respect to the question of the defendant's ability to prepare for trial on the schedule that the Court has set, the defense has not actually articulated a particular prejudice arising from the volume --

THE COURT: Well, just so we're clear, as a matter of formality, I set the date, but you and the defendant came to me with that date at the first conference, as I remember it, and I went along with what you both suggested.

MR. REHN: That's correct, your Honor. And I think also it's important to place in context the timing of the production in this case and the reason why they've been through some of the schedule they have been. A big part of that is that the more recent disclosures in particular have been in large part due to requests made of the government by the defense. So the large volume of third-party productions, the largest categories of that are productions from the FTX debtors of slack messages, which the defense has repeatedly requested of the government both in writing and in phone calls that we've had with the defense. And we've gone back to the FTX debtors to request those productions and now turned them over to the defense, and the defense is now saying, well, you know, we don't have the ability to review this in time for trial.

So it's a situation where if the defense wanted these materials, we've made efforts to get them from the debtors and produce them to them, and they're receiving them on the same

schedule that the government is. We're still more than a month out from trial. These are text searchable indexed productions of messages that the FTX debtors produced to us, and there's no reason why they can't be reviewed for potential -- materials potentially relevant to trial by both parties in the more than a month that we have remaining until trial.

The next category that the defense highlights are the Google documents. As we explained in our letter, the vast majority of the production from Google consists of a production that was produced by Google to the government pursuant to a search warrant of the defendant's own Google documents. So these are materials that the defendant has had access to throughout the pendency of this case, and indeed before the pendency of this case, and that the government only recently came into possession of and produced promptly when it came into possession of them.

So it would be an extremely perverse remedy to suggest that the defense should be able to preclude the government from using materials when the defense has had them for many, many months prior to the government and is presumably preparing to make use of them for trial itself. So there doesn't seem to be a real basis for any remedy at all based on the record that the defense has presented to us with respect to those categories of documents.

With respect to the last thing that the defense

mentioned, the code base history, we have been told by the FTX debtors that they did provide access to the entire FTX code and the code base history, what they called a commit history, which every time somebody updates the code, it commits, so it's called a commit history. We have no further access beyond what the defense has to the same code base and history, and so it's our understanding that it is both the code base and commit history that the defense has now had access to for some time.

THE COURT: Just so we have a clear record, when we're talking about access, we're talking about electronic access over electronic connection. Is that right?

MR. REHN: That's my understanding, your Honor, yes.

THE COURT: And that's true for the government, and it's true for the defense?

MR. REHN: That's correct, your Honor, yes. With respect to any excerpts of that that we have actually obtained as documents, those have been produced to the defense promptly as we received them.

THE COURT: All right. Anything further, Mr. Rehn, on this?

MR. REHN: Again, the one thing, just to highlight it, these are all categories of production that the government disclosed both to the Court and the defense back in June in our letter prior to the June 15 conference, and we specifically discussed at that conference that the slack messages from Gary

Wang's laptop would still need to be processed; that we were waiting on additional production of documents from Google search warrant; and that we were receiving additional third-party productions and producing them as we received them. So there's been no dilatory behavior by the government or no surprise to the defense that these particular productions would be forthcoming as time went by. And so the suggestion that the defense is somehow surprised by the fact that these have arrived, as the government stated that they would, we don't think it holds water.

THE COURT: Anything further, Mr. Everdell?

MR. EVERDELL: Your Honor, just on that point, it can't really be that the government says as long as we disclose that we're going to be producing these documents so late, then we can so produce them whenever we want and still use them at trial even when they are produced so close to trial and the defense has no meaningful way to actually review them before trial. So I don't see how that --

THE COURT: Well, you have text searchable databases, you have indices. Isn't that true?

MR. EVERDELL: We have a database, yes, your Honor, but what we don't have at this point is the ability to be able to do this and search this with our client, and that is a problem for preparing.

THE COURT: Well, we'll get to that in due course, but

I am not going to preclude any of this. And I want to be clear about why. Starting I think in a letter on June 5 and continuing in the motion the defendant made to preclude the government from using documents produced after July 1 -- and of course I'm using documents not only to refer to physical pieces of paper but information in electronic form also -- and then still further in its letter of August 28, the defense complains that the government recently has produced millions of pages of documents belatedly and in violation of what it characterizes as promises by the government and court deadlines.

Well, no one, least of all the government, disputes that it would have been preferable if the documents could have been produced earlier. The accusations of broken promises and missed deadlines are not at all accurate. They ignore the substance of what the government actually said. Moreover, the defense ignores the fact that the entire document production made to date, and conceivably parts of which are yet to come, occurred to discharge the government's obligation to comply with discovery obligations to the defendant which were created by the defendant's request for the material.

Moreover, the material is produced to the defendant on request, not to satisfy some urge of the government, but to further the goal of ensuring that the defendant gets a fair trial, and the defense ignores the reasons for the delays in producing some of the documents, consideration of which in my

judgment demonstrate that the nature of the defendant's complaints of broken promises and missed deadlines show that it's misleading.

To go back to square one -- and I think the defendant has acknowledged it in this conversation -- the only obligation on the part of the government was to produce documents in the government's possession, custody or control pursuant to Rule 16 and the defendant's request. On January 3, the very first conference I held in this case, the government made a clear distinction between materials that already were in its possession, which it expected to produce within the four ensuing weeks, save for data contained in electronic devices that were in the government's possession but the contents of which required extraction and review for privilege and responsiveness. The likelihood that additional materials would come into its possession in the days and weeks to come was clear and unequivocal.

There is no claim here that the government failed promptly to produce any of the materials that were in its possession last January, but the government was crystal clear that there were subpoenas and document requests outstanding; that the investigation was continuing; that it was attempting to extract and process information from accounts and electronic devices that it had obtained and would obtain, and that discovery would continue on a rolling basis.

On March 10, the government advised the defense and the Court that there were some problems with information that had not been in the government's possession earlier. One very large category was Google's slow, and as of that time incomplete, response to an outstanding search warrant. Another was difficulties in extracting information from some electronic devices and then reviewing the extracted information for the reasons I alluded to. But I set no deadline for completion because it was impossible to do it. The government did say that it believed that it would be able to produce the information from the electronic devices by the end of March and the material yet to come from Google by the end of April, but that was an anticipation. It wasn't a promise, and it wasn't a deadline. I could go on in a lot more detail, but it is unnecessary.

The fact of the matter is that the government kept both the defendant and the Court fully apprised of the reasons for the continuing production of these documents that were coming from non-parties, notably Google, or from extraction from electronic devices. There is just no evidence at all that the government didn't act in good faith and didn't make sincere efforts to expedite the whole process. There is no evidence that the government inappropriately delayed production of responsive information once the government had it.

On June 5, the defendant complained that a few

categories of expected documents hadn't been produced, and as the correspondence that's been filed in recent days demonstrates, most of those complaints -- not all, but most -- have been rendered moot by June 14. Moreover, the government went to considerable pains, I imagine, to produce all or most of this material in text searchable and indexed form, drastically reducing any burden in reviewing it for matters that were potentially important to the case.

Now, most recently the defendant complains that the government produced another 4 million documents -- I should say pages -- on August 24 and then 3.7 million more on August 28. But those complaints are really somewhat misleading. The government points out that the 4 million pages produced on August 24 were documents that only recently it obtained from Google which Google had not previously turned over to the government as a result of a production error of which the defendant was advised a long time ago.

Even more to the point, the vast majority of these documents were from the defendant's own Google accounts. They were therefore documents to which he had independent and essentially unfettered access until he was detained on August 11. He, therefore, had months in consultation with counsel, and whomever else he wanted to be in consultation with, to review and consider those documents. And he was in his parents' home with access to a computer and the internet

the whole time.

The 3.7 million page production on or about August 28 the government has explained consists very substantially of a duplicate subset of documents that were produced to the defendant a few days before. To be sure, I understand that the defendant claims in its letter of this morning that a little more than a quarter of those 3.7 million documents were, and I quote, "additional discovery, most of it from the FTX debtor entities." But the defendant does not contend that the government had that additional discovery material, materially before it produced it. He has given no indication of what the material contains, whether and why it's important, whether the defendant had access to all or part of it in the past, or how he is prejudiced by the government's discharge of its obligation to turn that material over.

So this latest of the defendant's complaints concerning an alleged deluge of millions of documents is very seriously exaggerated. He acknowledges that he had access to at least the vast majority of the 7.7 million documents through his own Google accounts for months before his bail was revoked, and to whatever extent there might have been an implication that the government violated its discovery obligations or failed to act in good faith, that implication is without merit.

Now, I am by no means unmindful about the burdens of the information age and the proliferation of electronic

devices, and the problems that they can give to counsel and litigants in cases like this. I'm very much aware of them, but I have heard absolutely nothing to justify precluding the government from using evidence that it has lawfully come by in a good faith effort to satisfy the defendant's Rule 16 obligations and to meet the trial date that the defendant and the government jointly proposed and adhered to for months and that the defendant adheres to to this day.

Now, I, of course, understand that the defendant asserts that there is a tension between being ready to go to trial on October 3 and the sort of review they claim they need in order to be properly prepared. In some degree, in a material degree, that's a tension of the defendant's own making.

Nonetheless, if the defendant in good conscience feels that he needs a postponement, which would be the ordinary relief that would be granted in the event of a Rule 16 violation -- and there has been none here that I'm aware of -- they can ask for it. I'm not saying I would necessarily grant it, but they can ask for it. And they will have to demonstrate if they do so a genuine and unanticipated need, which is not going to be satisfied, at least not likely to be satisfied, simply by talking about numbers of pages of documents. That's a factor to be considered, but there has to be more meat on those bones to make out the kind of case the defendants are

putting to me.

It is also vitally important that if the defendant is going to do this, they do it by the end of this week. The deadline for me to request a jury to start a trial on October 3 is September 7. And if we go past September 7, that means we would have called in a large number of prospective jurors to pick a jury starting October 3, and any change in the schedule would be a needless and useless imposition on them and would certainly weigh against the defense with respect to a postponement, although I would face it with an open mind altogether. It would not be the first time a jury panel had been called unnecessarily, but I take seriously the defendant's obligation here to move promptly if they're going to move, and that means by the end of this week.

Now, we already have -- and I'm not committing myself one way or another with respect to where a possible request might go if it were granted -- a second trial date in this case which has been held against the possibility that the Bahamas would grant consent to trying the severed charges. That date is March 11. Among the options that might be on the table would be a postponement to March 11, but I am not committing myself either to granting a postponement or as to the date. I'm simply putting all the cards on the table so counsel understands the apparent lay of the land. But that is the way it looks to me today, reserving all rights.

Okay. As to that, let's go on to the MDC problem. Who is going to address that for the government?

MS. KUDLA: Your Honor, I will. This is AUSA Danielle Kudla.

THE COURT: Let me tell you what the problems are. I'm sure you know them, but I can't understand why the defendant as of this morning didn't have hard drives that have been promised and that were delivered last week. For the defendant I don't understand the problem with battery life in the laptop they take to the cellblock when they go the cellblock because there are batteries, I mean, they have -- they run automobiles, I think they can run laptop computers. And there is something I found useful in the course of my life, it's called an extension cord so that you can plug in. I don't know whether or why that can't be used.

I want to come back to the government and say I don't understand what's going on about the air-gapped laptop that's been talked about and that apparently hasn't been produced. I will want to hear from the defense about why they didn't avail themselves of the opportunity to visit their client in the cellblock this week on the two days that the marshal service has been able to make available, and I want to know what visitation rights counsel have availed themselves of since August 11 .

So let's start with that. That's my list of

questions. Ms. Kudla, you can take the ones that are addressed to the government.

MS. KUDLA: Your Honor, I think let's start with the air-gapped laptop. That has been delivered to the BOP this morning, and the issue with that was -- the delay was waiting for BOP approval to allow the laptop to be admitted into the MDC. We found that approval on Monday of this week. We immediately provided counsel with technical specifications that the laptop could meet. We received that computer this morning. Our IT staff prepared it for the MDC and delivered it prior to this conference.

The next one that I would --

THE COURT: What about moving it from whoever took possession of it at the MDC to the defendant? I guess it's going into the visiting room, right?

MS. KUDLA: That is correct, your Honor. At this point in time I know it was dropped off to MDC legal, and my assumption -- we would have to check with MDC at this point about whether or not they moved it directly into the visiting facility, but that is something that we can inquire about. It will be available, I would like to comment on the hours. The laptop that has now been provided is available Monday through Friday 8:00 a.m. to 7:00 p.m. in the visiting rooms and Saturday and Sunday 8:00 a.m. to 3:00 p.m.

And this laptop is equipped with Microsoft Office,

Excel, PowerPoint and Adobe, which are primarily the tools that are allowing the defendant to record his information electronically and share that information with defense counsel through the exchange of hard drives back and forth.

And we have also -- that leads me into the next point, your Honor, about the hard drives if you would like me to address that.

THE COURT: I would, yes.

MS. KUDLA: So the hard drives, your Honor, we learned that the issue about the delivery of the drives through Mr. Everdell's letter last night and immediately contacted BOP regarding this issue. They confirmed that the drives were received on Monday and Tuesday of this week, and that they will be delivered to the defendant today. Obviously, there was a gap in time that serves no one's interest, but I think the effort here is to make sure that the defendant has these materials immediately and as quickly as possible. And in light of that, the BOP has agreed to procedures that will expedite this process dramatically in the future. And what they're going to be permitting the defendant to do is for counsel to drop off both drives, as many as they would like, both empty and filled with defense material, directly to the BOP legal staff. They will take those drives. They will etch it so it's a marking that will be tracked, and they will allow counsel to exchange those drives directly with the defendant at the legal

visitation hours, which, as we went over the hours, are available seven days a week if they choose to utilize those.

So that is with respect to the air-gapped laptop and the hard drives. I would just like to note that this is a process in the amount of time that all these procedures have come together that requires coordination of all parties. So to the extent there is an issue with the hard drives, such as the one that defense counsel raised, it is helpful that we become aware of those as soon as possible so we can alert the BOP and expedite the process as well.

Now, with respect to the battery life, your Honor, on the battery life issue, this is a process we -- it was put in place for one week to allow the defendant internet enabled access. It was raised that there was an issue with the battery life. We found out that the battery can be replaced, and we provided defense counsel with the exact requirement for the ability to purchase a battery for the computer. If we were to do that, it would take ten weeks for the government procurement process, so that's why we passed this information along immediately along to defense counsel to maximize the time and expedite this as fast as possible. That should enable the defendant to have approximately four to five hours of time in the cellblock.

Now, you mentioned the point about the extension cord. Your Honor, we have looked into that. That is a security risk

right now that the U.S. marshals are concerned about, admittedly so, having lengthy cords inside a cellblock area. But I want to step back, your Honor, from the technical requirements and look at basically what this is permitting the defendant to do, all of these procedures put in place by both the BOP and the marshal service.

He is permitted to review electronic discovery for approximately 70 hours per week if he wanted to through the air-gapped laptop that is now at the MDC and through the internet enabled laptop at the cellblock. He is able on both of these computers that are equipped with Microsoft Suite products to electronically record his work product and share that work product through the exchange of external drives with his defense counsel. He is able to view, build, edit and share electronic work product with counsel to assist them. And counsel has the ability to meet with the defendant seven days a week. And it's important to note here that this is not a pro se defendant. The defendant is not preparing his defense. He has a team of at least six attorneys, five additional legal staff members and at least seven experts that the government are aware of that are assisting in the preparation of this defense. And there is no question is that the defendant's attorneys and experts are continuing each day to prepare around the clock, and the defendant can continue to review his discovery and take notes around the clock as well.

So we believe that, you know, these accommodations are being set up in coordination with the BOP and the U.S. Marshal Service, which sometimes takes time to coordinate, but the moment we become aware of a problem, we assist in trying to expedite it and find solutions to that to allow the defendant to take advantage of them in a meaningful way if he so chooses.

THE COURT: What about the claim that the internet access from the cellblock has been difficult?

MS. KUDLA: Your Honor, I think that is the one constraint that is the more challenging to address. We have tested the laptop from the cellblock. The cellblock does have internet reception there. It is not the strongest of a 5G network because the cellblock was never designed to have internet reception, but it does permit internet-based access to the relativity database and the AWS database that the defendant is working on. So in terms of that, it's misleading to say that there is no internet access. There is --

THE COURT: They didn't say that.

MS. KUDLA: Your Honor, the issue about trying to improve the quality of the internet service is something that we continue to explore, but there are structural issues that make it complicated. But that said, defense counsel is able to have their laptops available and provide excerpts of the materials that they would like the defendant to specifically review and review that both at the MDC, and they can also

review that together at the cellblock if so desired.

THE COURT: Please remind me what floor of the courthouse the cellblock is on? It's on four, is it?

MS. KUDLA: Yes, your Honor I believe that is correct. It's on the fourth floor.

THE COURT: And the defense has made a good deal about wanting a proffer room that the U.S. Attorney's Office uses. Where would that be, if it were feasible?

MS. KUDLA: Your Honor, if it were feasible, it's on the fifth floor of the building.

THE COURT: Which building?

MS. KUDLA: 500 Pearl Street.

THE COURT: My recollection, of course, is that the courthouse does not have Wi-Fi everywhere, and I'm not sure it's any better on the fifth floor than it is on the fourth floor.

MS. KUDLA: Your Honor, I think we'd have to inquire into different floors about the internet availability, but I think one aspect of this that is worth noting and one of the considerations that goes into this analysis is the resources that are needed to accomplish it, and the cellblock allows the U.S. Marshals which are allocated to provide protection to not only the defendant but all defendants. It allows them to provide that to the defendant in the area where they are and also to all defendants that they are monitoring that day.

Moving it to another location within the building requires the manpower and resources of the U.S. Marshals that (A) raises concerns regarding the ability of the defendant to be in a proffer room alone with multiple electronic devices with his attorneys, who, for a number of reasons, can be momentarily distracted. There are those security concerns, along with multiple cords, and then also the manpower needed to supervise and man that operation by the U.S. Marshal Service that is designed to protect everyone, not solely the defendant.

THE COURT: Thank you, Ms. Kudla.

I assume is Mr. Everdell is going to discuss this, or Mr. Cohen.

MR. EVERDELL: That would be me, your Honor.

THE COURT: Go ahead.

MR. EVERDELL: Thank you, your Honor.

So I think what Ms. Kudla said is telling because I think the devil is in the details here, right? You asked the question about what about this internet access in the cellblock, and I think Ms. Kudla quite candidly said, well, it's not designed for that. It's not really all that great. I'm paraphrasing, of course, but that is the upshot, right?

So while these solutions may appear as if they may be solutions, they do not pan out in practice. That's what we're seeing, right? So the problem with the cellblock access, let's start with that. Up until this point -- I think the government

is proposing to change this, but up until this point it was simply that the defendant would be able to be produced to the cellblock twice a week to be able to use an internet enabled computer to review the discovery that was online. At that point in the prior weeks up until this point, it didn't have any capability of recording information; it didn't have a Microsoft Office Suite; it didn't have any ability for the defendant to actually look at what he was doing and then make notes or make work product that he could then bring back to the MDC. It was simply having a computer in the cellblock. He could look at things, and then he's got to, I guess remember it, and go back to the jail and do something with it that he remembered seeing in the cellblock.

And it was a problem, your Honor, because, as Ms. Kudla points out, the internet access is not viable there. The two times we tried to use it in the weeks he was produced, the first week this was available to him, he was produced Tuesday, and I believe it was Thursday of that week, and both times the internet went in and out, and it made it totally ineffective for him to be there and try to review documents with the internet going in and out.

The same thing with the battery life. At that time there was no power cord. I don't think there's going to be a power cord because of the safety issue, so you have to rely on the battery. The first time he showed up, there was I think

only one hour on the battery. He can't bring the laptop with him. It has to stay with the marshals in the cellblock, so they are the ones having to remember to charge it. And if they don't, then we get that problem no matter what battery is in there.

THE COURT: And you could be the ones to bring down the backup battery when you go down to see him there.

MR. EVERDELL: Your Honor, we would be happy to do that. The problem is that every time we have a procedure like this, there is always a hitch. We won't be able to -- I anticipate we will be told we won't be able to give the battery across to the marshals. There's always something that goes wrong. For example, when the defendant was first produced, when he was produced to the cellblock, I guess it was last week or the week before, he wanted to bring some papers with him, and the marshals said you can't have papers with you and they confiscated the papers.

Every time there seems to be something that we are at least trying to work with, in practice it breaks down because of things that are beyond our control. A random MDC person can say, I'm not going to give your laptop. You can't bring that to the cellblock with you or the battery isn't charged. All of these things have happened and we anticipate will happen.

MR. COHEN: Your Honor, if I might, jut to give a little more context. I know once upon a time your Honor was

yourself a trial attorney, a superb one. This is what happened to us. We went to cellblock. There are no outlets in the cellblock for security reasons. We were given a laptop that was said there is only an hour of charge on it. We asked your Honor's question, can we get an extension cord, which is a great question. We were told no. So we were faced with our client having to be transported for five hours to sit in a cell where he had limited life of a battery and flickering in and out internet access. It just wasn't viable for any kind of real trial preparation. It's not glass. It's a very thick screen so we can't even write notes that we can show each other. So having done that for two days, we decided that this was just not viable. That's why we requested that he not be produced, and we see him instead at the MDC every day last week and every day this week someone from our firm has seen him, usually me or Mr. Everdell or both.

It's just in practice, your Honor, we understand that the Bureau of Prisons says a lot of things and everyone's experience on this call promises a lot of things just don't happen. And the weeks tick by and the days tick by and we're put at a very difficult disadvantage. There is no substitute for speaking with your client in defending a criminal case. There just isn't in a meaningful way.

MR. EVERDELL: Where that leaves us, your Honor, is I don't think we have faith that the solutions proposed by

Ms. Kudla are going to work in practice. So we feel like, especially given the short amount of time leading up to trial that we have, we've already lost three weeks because, your Honor, he has not had access to discovery for three weeks. And now we have only a short amount of time he left. Given that we foresee that there will be hitches and problems that this will not work out in practice --

THE COURT: Maybe yes or maybe no.

MR. EVERDELL: Well, your Honor, given the track record I think that we have seen so far, we're not trying to assign blame here, but it's just the practical reality that we haven't been able to make effective use of our client's time at least in the cellblock elsewhere, and he doesn't have this computer yet in the MDC. We really are at the point where we feel like a temporary release is necessary so that he can actually prepare for his trial. And that it is -- this is the type of situation where given the complexity of the information, the extraordinary volume, and the fact that the alternatives that we have been trying to reckon with have not worked out in practice, and the fact that we only have a limited amount of time before trial starts, that we need him to be released to temporary release so we can properly prepare for trial. And I'm happy to discuss with the Court what we think the contours of that would look like, but we think that we're at that point and we need that remedy.

THE COURT: Ms. Kudla, anything else?

MS. KUDLA: Your Honor, I would just note one point. The defendant prior to August 11, it should be clear, he had unfettered access to all of the discovery in multiple ways, including the ability to communicate with his entire team of attorneys and legal staff and a number of experts. And during this time he had that ability to communicate through a variety of means: In-person meetings, telephone calls, videoconferencing, and electronic document sharing applications which played into the events of August 11. And that changed when the defendant improperly -- the defendant had -- there was a determination that he posed a danger to the community and to others. And now that is what we're talking about here, and at this point in time there are a number of procedures in place very quickly, I might add, that allow him access to review discovery and to communicate with attorneys seven days a week up to 70 hours if he so chooses. So, your Honor, the Sixth Amendment does not guarantee a right to every desire that a defendant may want, but it's effective assistance of counsel and to meaningfully participate in a defense, and that's what we think these accommodations have provided.

THE COURT: Okay. I'm not going to rule on this application now. What I would like is a joint report Tuesday morning concerning the exact situation at the MDC as of that time. What's been provided, what's in place, what works; and

if anything doesn't work, I want to know about that too, and we will see. And, as I say, if there is to be an application for more time from the defense, it would best be made by the close of business Friday, but it's not a deadline. I would consider one made later but with reluctance.

Okay. Advice of counsel. I will start out by saying that I am going to order some disclosure, but I think the defendant's suggestion that disclosure on this subject might make more sense after the government's disclosures on September 8. I think that makes sense. And so I am going to require that the defendant's disclosures, whatever they turn out to be, be made on or before September 15.

So what I would like to have is a joint proposal by the close of business Friday as to exactly what disclosures the defendant will make. If the parties can't agree entirely, I would like a joint letter setting out what they agree upon and what they haven't and their respective positions on the areas of disagreement, and then I will resolve the disagreement over the weekend, and that will give the defendant time to make disclosures by the 15th.

Now, please understand, I understand I have demanded a lot from you folks in the last week. You have demanded a lot from me. That's fine. I'm very appreciative of the efforts that you have all made on both sides and the zealous and very capable advocacy on both sides. It's been very helpful, and I

think that's where we stand.

Anybody want to raise anything else before we terminate this?

MR. COHEN: Not from the defense, your Honor.

MR. ROOS: Your Honor, just one thing from the government. I don't know your Honor is very aware of this, but I think in addition to the issue relating to the jury pool coming in and the need to know promptly an adjournment, which, by the way, I don't think we think is necessary, and I know the Court is not expressing an opinion on, but also our 3500 and exhibits are due on September 8. So if the defense was contemplating an adjournment request, I think it would be important to know before then before all those materials are disclosed.

THE COURT: I'm glad you mentioned that, Mr. Roos. It's a very important point. And I think the defense should take heed. Certainly an application made after the 3500 material has been produced and witnesses identified puts us in a whole different realm on the question of an adjournment, and I'm sure you appreciate that. If I am misapprehending something about that, Mr. Cohen, you need to tell me now.

MR. COHEN: No. We understand, your Honor.

THE COURT: Okay. All right. Anything else?

Well, I would wish you all a good weekend, but that would be rubbing salt in an open wound, I understand that.

Have the best ones you can. Thank you very much.

MR. REHN: Thank you, your Honor.

MS. SASSOON: Thank you, your Honor. You too.

(Adjourned)